Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

GEORGE H. KEYS, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION IN THE COURT BELOW.

The opinion of the Eighth Circuit Court of Appeals was filed March 2nd 1942. It was reported in 126 F (2d) 181, and is shown in full at page 58 of the printed record.

II.

JURISDICTION.

A complete statement of the basis of the jurisdiction of this court has been given under heading B of the petition *supra*. In the interest of brevity it is not repeated.

III.

STATEMENT OF THE CASE.

A statement of the case has been given under heading A.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals of the Eighth Circuit erred

First: In holding that there was sufficient evidence in the record to authorize the submission of the case to the jury.

Second: In holding that the indictment contained sufficient allegations to charge an offense under Section 408d (c).

Third: In failing to give force and effect to the holding of this court in the case of *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479, 58 S. C. R. 300, 303, in defining the word "injury."

Fourth: In holding that the falsity of the pamphlet threatened to be distributed was not an essential element of the offense charged.

V.

SUMMARY OF ARGUMENT.

Point A.

The statement involved requires as a prerequisite to culpability a "threat to injure." The word "Injure" in its legal sense means to wrong a person by the violation of his legal rights, and damage to one without an injury does not lay the foundation for legal action.

A threat to disseminate the truth about aluminum such as that set forth in the pamphlet Exhibit 3 (R. 19)

is not a legal wrong, therefore not an injury, being *damnum absque injuria.*

Alabama Power Co. v. *Ickes,* 302 U. S. 464, 479, 58 S. C. R. 300, 303.

Keogh v. *Ry. Co.,* 260 U. S. 156, 163.

Restatement of the Law of Torts, p. 16, Sec. 7.

Burnsides v. *State,* (Tex.) 102 S. W. 118, 120, 121.

McKay v. *Retail Auto., etc., Union,* 106 Pac. 2d 373, 374, 379 (Calif).

Point B.

The indictment (Appendix A, infra) is defective in that it fails to set forth facts showing or tending to show a threat by petitioner to commit some invasion or violation of a legal right to addressee, or in failing to allege that the pamphlet threatened to be distributed contained untruthful statements. This is an essential element of the offense defined in the statute, for without wrong, there could be no injury.

Alabama Power Co. v. *Ickes,* 302 U. S. 464, 479, 58 S. C. R. 300, 303.

Keogh v. *Ry. Co.,* 260 U. S. 156, 163.

Restatement of the Law of Torts, p. 16, Sec. 7.

Burnsides v. *State,* (Tex.) 102 S. W. 118, 120, 121.

McKay v. *Retail Auto., etc., Union,* 106 Pac. 2d 373, 374, 379 (Calif.)

(a)

It is fatal error to omit an essential element of the offense charged.

United States v. *Hess,* 124 U. S. 483, 487, 8 S. C. R. 571.

United States v. *Cruikshank,* 92 U. S. 542, 558.

United States v. *Carll,* 105 U. S. 611, 613.

Fontana v. *United States,* 262 Fed. 283, 288.

Point C.

The word "injury" is a generic term. Since the result of the act is injurious or merely harmful, depending upon whether the act is tortious or lawful, it is not enough for the indictment to charge that a "threat to injure," was made, as that is but the statement of a conclusion. All of the elements that go to make an "injury" must be pleaded.

(See same cases cited under Point B (a) *Supra* p. 11.)

(a)

Where certain language does not constitute a threat under some circumstances, but does constitute a threat under other circumstances, it is not enough for an indictment to charge that the language was a criminal threat made with the intent to violate the law, since that would be a mere conclusion of the pleader. All of the elements which go to make the threat a crime must be pleaded.

Fontana v. *U. S.*, 262 Fed. 283, 288 (C. C. A. 8).

VI.

ARGUMENT.

Point A.

The statement involved requires as a prerequisite to culpability a "threat to injure." The word "injure" in its legal sense means to wrong a person by the violation of his legal rights, and damage to one without an injury does not lay the foundation for legal action.

The record is void of any competent evidence that the pamphlet which petitioner threatened to distribute was false or untruthful in any particular. In fact counsel for respondent stated in their brief in the Court of Appeals:

> "* * * the question of their falsity is not an issue" (Appellee's Brief p. 11).

Congress in its wisdom selected the word "injure" with a presumed conclusion of its legal meaning as contained in many decisions, laws and text-books. Had it desired to include within the scope of this Act threats to do lawful things, it would have chosen in lieu of "injure" the word "harm" or "damage."

This court in the recent case of *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479, held:

> "The injury which petitioner will suffer, it is contended, is the loss of its business as a result of the use of the loans and grants by the municipalities in setting up and maintaining rival and competing plants; * * * 'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act com-

plained of does not violate any of his legal rights, it is obvious that he has no cause to complain * * *. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of right, the person injured is entitled to an action.' *Parker* v. *Griswold,* 17 Conn. 288, 302-303. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained."

In the case of *Keogh* v. *Ry. Co.*, 260 U. S. 156, 163, the court held:

"Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right."

In Restatement of the Law of Torts, Sec. 7, page 16, it is said:

" 'Injury' and 'harm' contrasted. The word 'injury' is used throughout the Restatement of this Subject to denote the fact that there has been an invasion of a legally protected interest which, if it were the legal consequence of a tortious act, would entitle the person suffering the invasion to maintain an action of tort. It differs from the word 'harm' in this: 'harm' implies the existence of a tangible and material detriment. The most usual form of injury is tangible harm; but there may be an injury although no harm is done. Thus, any intrusion upon the land in possession of another is an injury and, if unprivileged, gives rise to a cause of action even though the intrusion is beneficial or so transitory that it constitutes no tangible interference with the beneficial enjoyment of the land. * * * It is desirable to have a word to denote the type of result which, if the act which causes it is tortious, is sufficient to sustain an action even though there is no tangible harm for which truly compensatory damages can be given. The meaning of the word 'injury', as here defined, differs from the sense in which the word 'injury' is often used which indicates that the invasion of the interest in question has been

caused by conduct of such a character as to make it tortious."

The Court of Criminal Appeals of Texas had a case where a member of a posse threatened to arrest one who was a law violator and then accepted a bribe to release the prisoner. If the defendant was in fact an officer he was not threatening to do an unlawful act in threatening to arrest, but if an officer the threat was to do a lawful act, and therefore nonactionable. Said the Court in vacating a verdict of guilty:

> * * * "there must be a threat to do some illegal act injurious to the character, person or property of the prosecutor by which he is fraudulently induced to part with and deliver something of value to appellant, with intent on his part to appropriate same, and, unless these elements exist in what was done, there is no offense under this article."
>
> *Burnsides* v. *State,* (C. C. A. Tex.) 102 S. W. 118, 120, 121.

In the case of *McKay* v. *Retail Auto Union,* 106 Pac. 2d 373, the Supreme Court of California said:

> (10) "It is equally beside the question to speak of threats, where that which is threatened is only what the party has a legal right to do. In one of his dissenting opinions Mr. Justice Holmes succinctly commented upon the use of such terms as follows: 'I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to "compulsion," it depends on how you "compel"! * * * So as to "annoyance" or "intimidation."' " *Vegelahn* v. *Guntner,* (1896) 167 Mass. 92, 107, 44 N. E. 1077, 1081, 35 L. R. A. 722, 57 Am. St. Rep. 443.

Point B.

The indictment (Appendix A, infra p. 21) is defective in that it fails to set forth facts showing or tending to show a threat by petitioner to commit some invasion or violation of a legal right to addressee, or in failing to allege that the pamphlet threatened to be distributed contained untruthful statements.

The indictment (Appendix *infra* p. 21) contains no word or phrase that identifies or describes the character of the act that petitioner was charged with threatening to commit. That part of it containing the words "injure" and "injury" is as follows:

> "* * * the said communication then and there containing a threat to injure the reputation of the said addressee unless money and other things of value should be paid over to the said George H. Keys, the said injury to the reputation of the addressee contemplated as aforesaid being embraced by a threat in said communication contained that the said George H. Keys would distribute a pamphlet to the public to the effect that the use of aluminum cooking utensils is harmful and is a causative factor in diabetes and other diseases."

(a)

It is fatal error to omit an essential element of the offense charged.

This court in the case of *United States* v. *Hess*, 124 U. S. 483, 487, said:

> "The doctrine invoked by the solicitor general, that it is sufficient, in an indictment upon a statute, to set forth the offence in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

And then quoted *United States* v. *Cruikshank,* 92 U. S. 542, as follows:

> " 'It is an elementary principle of criminal pleading that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species; it must descend to particulars." 1 Arch. Cr. Pr. and Pl. 291.' "

And said this court, speaking through Mr. Justice Gray in *U. S.* v. *Carll,* 105 U. S. 611, 613:

> "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished: and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In the case of *Fontana* v. *United States,* 262 Fed. 283, 288, the Court of Appeals adhered to the principles above and cited the above decisions as its authority. We quote:

> " * * * It is an elementary rule of criminal law that where language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so that the court can determine, and not the pleader, whether or not they constitute the crime. *United States* v. *Hess,* 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516; *United States* v. *Cruikshank et al.,* 92 U. S. 542, 23 L. Ed. 588; *United States* v. *Carll,* 105 U. S. 611, 26 L. Ed. 1135; *Shilter* v. *United States,* 257 Fed. 724, 725 (C. C. A.).

Take, for example, the first charge in the indictment, that the President secured his election on the slogan 'kept us out of war,' and by using his high office whipped the members of Congress into line to secure the authority to enter the war. If that statement was made in a private conversation with a loyal citizen, in the presence of no other person, his utterance of it was not susceptible to the inference that he made it with any of the evil intents charged, or to the inference that it was reasonably calculated to produce the results alleged. Perhaps, however, if it had been made in a public address, in the presence of men who were members of the military or naval forces of the United States, such an utterance might, in view of other things said in the same address, have been susceptible to a different inference. Take the fifth statement, that he 'stated to his congregation and to divers persons, whose true names are to the grand jurors unknown, false and injudicious statements as aforesaid.' That charge is so indefinite and ambiguous that it is clearly insufficient to warrant the introduction of any evidence under it. No court can determine from it whether it means that he made the statements preceding it, or that he made other injudicious statements to them, in the same way that he made the preceding statements. The allegations in the indictment regarding the other statements are likewise indefinite and insufficient, and for the reasons which have been suggested the demurrer to the indictment should have been sustained, and the defendant should have been discharged without a trial."

Point C.

The word "injury" is a generic term. Since the result of the act is injurious or merely harmful depending upon whether the act is tortious or lawful, it is not enough for the indictment to charge that a "threat to injure" was made, as that is but the statement of a conclusion. All of the elements that go to make an "injury" must be pleaded.

(See same cases cited under Point B (a) *supra* p. 11.)

(a)

Where certain language does not constitute a threat under some circumstances, but does constitute a threat under other circumstances, it is not enough for an indictment to charge that the language was a criminal threat made with the intent to violate the law, since that would be a mere conclusion of the pleader. All of the elements which go to make the threat a crime must be pleaded.

The case of *Fontana* v. *U. S.*, 262 Fed. 283, 288 (C. C. A. 8), above quoted, applies the principle contained in this heading. The words of the court to that effect have been quoted under our Point B (a).

The petitioner owed the addressee no enforcible duty to refrain from speaking truthfully with reference to the effects of aluminum kitchen ware upon the human body. The words of Mr. Justice Holmes, spoken as a member of the Supreme Court of Massachusetts to the effect that what you may do in a certain event you may threaten to do, that is "give warning of your intention to do," and "thus allow the other person a chance of avoiding the consequences," are fitting here.

The fact that the statute herein involved may be said to be ambiguous in that a citizen would have to guess at whether his act was or was not a violation of law, did not justify the trial court in submitting to the jury a set of facts involving a mere guess. Nor did the verdict validate the indictment that involved that guess.

Respectfully submitted,

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